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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1953

NO. 449

UNITED STATES OF AMERICA, PETITIONER

v.

MEAD GILMAN, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of California (R. 26–29) is not reported. The opinions of the Court of Appeals (R. 52–59) are reported at 206 F. 2d 846.

JURISDICTION

The judgment of the Court of Appeals was entered on August 3, 1953. The petition for a writ of certiorari was filed on October 30, 1953, and was granted on December 14, 1953 (R. 61). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the United States may recover indemnity from a government employee for whose negligence the Government has been held liable under the Federal Tort Claims Act.[1]

STATUTE INVOLVED

The pertinent sections of the Federal Tort Claims Act provide as follows:

28 U. S. C. 1346 (b).

> Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accord-

[1] Two cases (*United States* v. *Jevarijian and Harrison* v. *United States*) presenting the question here involved are currently pending in the Courts of Appeals for the Second and Fourth Circuits respectively. We are advised that those cases will not be decided until this Court enters its opinion in the instant case.

ance with the law of the place where the act or omission occurred.

28 U. S. C. 2674.

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages. * * *.

28 U. S. C. 2676.

The judgment in an action under section 1346 (b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

STATEMENT

An action was brought against the United States by one Darnell under the Federal Tort Claims Act (28 U. S. C. 1346 (b)) for injuries arising from an automobile accident involving vehicles of Darnell and the Government (R. 3–7). Respondent, an employee of the United States Coast and Geodetic Survey, Department of Commerce, was the driver of the government car (R. 8).[2] The Government moved under Rule 14

[2] A regulation of the United States Coast and Geodetic Survey contemplated that employees would carry insurance covering their driving of government vehicles. It provided (U. S. Coast & Geodetic Survey Regulations, par. 1080):

"TRAFFIC REGULATIONS—

(a), Federal Rules of Civil Procedure,[3] for leave to implead respondent as a third-party defendant (R. 17–19).[4]

* * * * *

"(b) The chief of party is authorized to require all employees operating trucks of the Bureau to obtain, at the operator's expense, a limited form of liability insurance as protection from personal liability for damage incurred while driving Government vehicles. Additional information regarding this matter may be obtained from the Washington office."

[3] "Before the service of his answer a defendant may move ex parte or, after the service of his answer, on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. If the motion is granted and the summons and complaint are served, the person so served, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant."

[4] Respondent, together with the Coast and Geodetic Survey, had been named with the United States as defendants

Upon the granting of this motion, a third-
arty complaint was filed, asking that, if the
nited States should be held liable to the original
laintiff, it have indemnity against respondent
or the full amount of its liability (R. 20–21).
espondent moved to dismiss the third-party
omplaint. The district court denied the motion
n the ground that, under accepted principles of
ne California law, an employer is entitled to
ndemnity for liability resulting from his em-
loyee's negligence (R. 25–29). Upon a trial,
ne district court found that the plaintiff's in-
uries were caused solely by the negligence of
espondent acting within the scope of his em-
loyment as an employee of the United States,
nd accordingly entered judgment against the
nited States under the Tort Claims Act for
5,500, and judgment over for the United States
gainst respondent, the third-party defendant,
or the same amount (R. 34–44).

The respondent appealed, contending (1) that
nder the rationale of *United States* v. *Standard*
il Co., 332 U. S. 301, which held that the Gov-
rnment in the absence of statute could not re-
over for the loss of the services of a soldier
njured by the negligence of a third-party tort-

the plaintiff's original action. Subsequently, and before
ne motion to bring in respondent as third-party defendant,
ne action was dismissed as to both of these defendants, with
ne consent of the plaintiff (R. 11–16). No issue is here
resented as to the propriety of these dismissals.

feasor, the common law action for indemnity was also not available, in the absence of statute, to the United States; and (2) that the action was barred under that section of the Tort Claims Act (28 U. S. C. 2676) which provides that a judgment in an action under 28 U. S. C. 1346 (b) shall constitute a complete bar to any action by the injured person against the employee of the Government.

Without passing upon respondent's contention that the action was barred by the rule of the *Standard Oil* case (R. 56), the court of appeals, in a 2–1 decision, reversed the third-party judgment of the district court (R. 52–57). It held that although 28 U. S. C. 2676, by its terms, pertained only to actions by the injured claimant and not to an indemnity action by the Government, it constituted an indirect bar to the third-party action for indemnity. The court reasoned as follows: The cause of action for indemnity is based on the principle that the employee is unjustly enriched by an action against the employer under the doctrine of *respondeat superior,* resulting in the employer's satisfying a liability which is the primary responsibility of the employee. Since by virtue of 28 U. S. C. 2676 the entry of a judgment against the Government, unlike the entry of judgment against a private employer, relieves the employee of further responsibility, the Government's payment of such a

judgment cannot be said unjustly to enrich the employee.

Judge Harrison, sitting by designation, dissented (R. 57). He urged that *United States* v. *Yellow Cab Co.*, 340 U. S. 543, in which this Court stated that the Government was entitled to contribution from joint tortfeasors, was controlling. He also urged that the Government should not be treated differently from private employers and that the rule established by the majority would encourage collusion between employees and injured claimants.

SPECIFICATION OF ERRORS TO BE URGED

The court of appeals erred:

1. In holding that the United States may not recover indemnity from its employee for whose negligence the United States has been held liable under the Federal Tort Claims Act.

2. In holding that a judgment against the United States under 28 U. S. C. 1346 (b) bars the United States from asserting a right of indemnity against its negligent employee.

3. In reversing the judgment of the District Court.

SUMMARY OF ARGUMENT

A.

1. A private employer has a right of indemnity against an employee where the employer has been cast in damages on *respondeat superior* principles solely by reason of the negligence of the

employee. The nature of the action is quasi-contractual and it is based on the theory of unjust enrichment. Restatement, *Restitution* § 76; Woodward, *Quasi Contracts* (1913) §§ 258–259.

2. (a) The Tort Claims Act, by imposing liability on the United States for the negligent acts of its employees, has placed it generally in a position corresponding to that of a private employer. Without specific statutory authorization, it has been held that, under the Act, the United States is both entitled to receive and must give contribution (*United States* v. *Yellow Cab Co.,* 340 U. S. 543), and that it is entitled to be indemnified by a third-party tortfeasor (*United States* v. *Savage Truck Lines,* Nos. 6648–6651, decided December 21, 1953, C. A. 4). No logical reason exists for withholding from the United States the comparable right of indemnity against the negligent employee which all private employers have. It has long been settled that no specific statutory authority is required for the assertion by the United States of a conventional common law action. *Cotton* v. *United States,* 11 How. 229, 231. This rule applies equally to actions based on quasi-contractual principles. *Wisconsin Central R. R. Co.* v. *United States,* 164 U. S. 190.

(b) *United States* v. *Standard Oil Company,* 332 U. S. 301, is not to the contrary. There, the United States, relying on the special relationship between it and a soldier, sought to invoke

the ancient action *per quod servitium amisit* to recover for loss of services and the attendant expenses of medical care. It was conceded that no exact precedent existed and that a *new* right had to be created. The Court declined to extend the doctrine into new fields, holding that Congress, rather than the courts or the executive, should provide such an extension, as the issue primarily involved a fiscal matter concerning which Congress was fully aware and in respect of which it had not acted. Here, on the other hand, there is no special status but only the normal employer-employee relationship; the right sought by the United States is not new but traditional; and there is no long awareness of the problem on the part of Congress, coupled with a manifest disinclination to provide a remedy.

B.

Since the right of indemnity is a quasi-contractual right which the United States can enforce without specific statutory authorization, Congress would have had to make an explicit provision in the Tort Claims Act had it been intended to preclude the United States from asserting its traditional common law right. There is no such provision, and the legislative history of the Act indicates, on the contrary, that the ordinary incidents of a tort action against an employer are to apply.

1. The legislative history of the Act, beginning with the 76th Congress and continuing down to the date of its enactment by the 79th Congress,

discloses a continual departure from statutory enunciation of particular rights and liabilities—other than jurisdictional ones—and a tendency to rely upon accepted principles of general law. For instance, though the right to contribution is not spelled out, it is available. *United States* v. *Yellow Cab Co.*, 340 U. S. 543. This tendency, of itself, rebuts any presumption that Congress had any purpose to circumscribe conventional common law remedies available to the United States.[5]

2. 28 U. S. C. 2676 does not defeat the right of the United States to indemnity. That section provides that a judgment in a tort action against the United States shall constitute a complete bar to any action by the claimant against the employee. By its very terms, it applies to the claimant only, and in enacting it Congress was not influenced by any desire to immunize the employee but rather by the consideration that government personnel were called upon to defend suits against the employee personally. In effect, the provision is the analogue of the general rule that satisfaction of a judgment against the employer absolves the negligent employee; the provision

[5] Such legislative history as is available indicates that it was not intended in the draft bill before the 77th Congress to seek reimbursement from the employee where an *administrative* settlement was made; but in that aspect affirmative legislative action would be necessary in order to impose liability on the employee, as an administrative settlement, unlike a suit, is a voluntary assumption of liability. See 40 Op. Atty. Gen. 38.

has the virtue of removing any question which might arise in one or more of the states, the laws of which would otherwise control.

The reasoning of the court below in respect to Section 2676 is fallacious. The imposition of liability upon the United States where it is the employer is a benefit to the employee, and the fact that he is thereby released from liability to the injured claimant does not exonerate him from liability to his principal on unjust enrichment principles. Restatement, *Restitution*, §§ 76, 78, 86.

ARGUMENT

THE UNITED STATES MAY RECOVER INDEMNITY FROM AN EMPLOYEE FOR WHOSE NEGLIGENCE THE UNITED STATES HAS BEEN HELD VICARIOUSLY LIABLE UNDER THE FEDERAL TORT CLAIMS ACT

INTRODUCTION

This third-party action was brought by the United States to recover over from respondent, its employee, the amount for which it might be held liable for damages allegedly caused by respondent's negligence.[6] After judgment had been

[6] It is the position of the Government that it may seek indemnity in each case arising under the Act. In determining whether to assert the right in a particular case, the United States, like any private litigant, is largely influenced by the financial responsibility of the negligent employee. The financial responsibility of employees of the United States had been found inadequate to compensate private individuals for damages resulting from their negligent acts. This led first to the spate of private bills which preceded the enactment of the Tort Claims Act, and now constitutes the

entered in favor of the injured party, the trial court, citing California law, held that the fact that the employer in this case was the United States and the employee a civilian employee did not affect the general rule allowing indemnity to an employer, and entered judgment for the United States against the respondent for the full amount of the original award (R. 26–44). On appeal, the court below reversed (R. 52–57). The court of appeals correctly concluded that federal and not state law controlled, that the action of indemnity was *quasi contractual* in theory, and that it was based upon the concept of unjust enrichment resulting from the benefit conferred upon the employee by the employer's discharge of an obligation which, in equity and good conscience, the employee, the one who was actually guilty of the negligence, ought to have paid. In holding that the Government was not entitled to indemnity, however, the court reasoned that upon the entry of a judgment against the United States in an action under the Tort Claims Act, 28 U. S. C. 2676 (*supra*, p. 3) made the employee no longer

basic reason for resort to suit against the United States under the Tort Claims Act, even though the plaintiff is compelled to forego the right to a trial by jury which he would have in a suit against the government employee. The same reason makes it impracticable for the United States to assert its right of indemnity in any appreciable number of cases. In practice, therefore, assertion of the right has been limited to instances where the employee is insured and where restitution would work no financial imposition upon the employee himself. See fn. 2, *supra*, pp. 3–4, and fn. 18, *infra*, pp. 24–25.

answerable to the claimant; that payment of the judgment by the Government was not, therefore, the payment of a sum which the employee ought to have paid and conferred no benefit upon the employee. Hence, the court concluded, there was no basis for the Government's claim of indemnity.[7]

In seeking restitution from its agent, the United States asks only for nondiscriminatory application to it, as an employer, of the historic rule of the common law which recognizes the employer's rights over against the employee. We therefore agree with the court's analysis of the nature of the action for indemnity in these circumstances. The Court's basic error lies in the incorrect effect it ascribes to Section 2676 of the Tort Claims Act, which, on its face, is a limitation only on the rights of a claimant and affords no basis for treating the United States differently from a private employer in the same circumstances.

Going further than the Court of Appeals, respondent has argued that the United States is

[7] Though of the opinion that the question of the duty owed by a government employee to the Government was to be determined by federal rather than state law, the court below indicated that its result would be the same whether state or federal law be applied. We believe that the right of indemnity in the circumstances of this case, involving as it does only the federal relationship of the Government and its employee, and the quasi-contractual rights of the United States arising out of such relationship, is a right which commands uniform recognition throughout the United States and should not be dependent upon local law. *United States* v. *Sandard Oil Co.*, 332 U. S. 301, 305–311.

precluded from seeking indemnity, not only by 28 U. S. C. 2676, but also by the nature of an indemnity action, as he interprets it, and the aims of the Tort Claims Act, as he conceives them. It is, therefore, appropriate for us to begin by discussing the common-law action for indemnity and the right of the United States, as employer, to maintain such a suit without specific statutory authorization. *Infra*, pp. 14 *ff.* After showing that the Government has the employer's normal right to bring an indemnity action against the employee, we shall show that nothing in the Tort Claims Act deprives the Government of this right, but rather that the Act's structure and history reveal a Congressional purpose to follow the conventional law in this respect. *Infra*, pp. 27 *ff.* In this connection, we shall discuss the error in the court of appeals' reading of 28 U. S. C. 2676 (*infra*, pp. 31–41).

A. THE COMMON LAW ACTION FOR INDEMNITY, OPEN TO A PRIVATE EMPLOYER, MAY BE ASSERTED BY THE UNITED STATES WHERE IT HAS BEEN HELD LIABLE TO A THIRD PARTY AS A RESULT OF THE NEGLIGENCE OF AN EMPLOYEE

1. *A common law action for indemnity arises whenever an employer is held liable for damages because of the negligence of his employee.*—It is well settled at common law that an employer who responds in damages to a third person solely by reason of the negligence of an employee is en-

titled to be indemnified by the employee whose negligence gave rise to the claim.[8] This right of an employer is a classic illustration of the general principle that, whenever the wrongful act of one person results in liability being imposed upon another, the latter may have indemnity from the person actually guilty of the wrong. *Chicago City* v. *Robbins,* 2 Black 418; *Washington Gas Co.* v. *Dist. of Columbia,* 161 U. S. 316, 328; *Gray* v. *Boston Gas Light Co.,* 114 Mass. 149. The principle applies in a variety of circumstances: Where a municipal corporation has been held liable for a defective street occasioned by the neglect or failure of another to perform a legal duty (*Washington Gas Co.* v. *Dist. of Columbia,* 161 U. S. 316); where a property owner has been

[8] *Washington Gas Co.* v. *Dist. of Columbia,* 161 U. S. 316, 328; *Brown & Root* v. *United States,* 92 F. Supp. 257, 262, (S. D. Tex.), affirmed, 198 F. 2d 138 (C. A. 5); *Johnston* v. *City of San Fernando* (Calif.) 35 C. A. 2d 244, 246, 95 P. 2d 147; *Myers* v. *Tranquility Irr. Dist.* (Calif.) 26 C. A. 2d 385, 389, 79 P. 2d 419; *Bradley* v. *Rosenthal,* 154 Cal. 420, 424, 97 P. 875; *Smith* v. *Foran,* 43 Conn. 244; *Lough* v. *John Davis & Co.,* 30 Wash. 204, 209–210, 70 P. 491; *Railroad* v. *Greer,* 87 Tenn. 698, 702–703, 11 S. W. 931; *Grand Trunk Railway Co.* v. *Latham,* 63 Me. 177; *Costa* v. *Yochim,* 104 La. 170, 28 So. 992; *Ga. So. & Florida Ry. Co.* v. *Jossey,* 105 Ga. 271, 31 S. E. 179; *Green* v. *New River Co.,* [1792] 4 T. R. 589; *Yeomans* v. *Legh,* [1837] 2 M. & W. 419; *Weld-Blundell* v. *Stephens,* [1919] 1 K. B. 520, 536; *Jones* v. *Manchester Corp.,* [1952] 1 T. L. R. 1589, 1593; Restatement, *Agency* § 401, comment c; Mechem, *Agency* (2d Ed.) §§ 1292, 1293; *Cooley, Torts* (3d Ed.) pp. 255, 1172–1173; Smith, *Master & Servant, England & Canada* (1906) p. 93; Salmond, *The Law of Torts* (10th Ed.) p. 78.

compelled to pay damages for a defective wire attached to the chimney of the owner's house by another (*Gray* v. *Boston Gas Light Co.,* 114 Mass. 149); where the occupier of premises has been held liable for the faulty condition of the owner's property (*Chicago & N. W. Ry. Co.* v. *Dunn,* 59 Iowa 619, 13 N. W. 722); where a retailer has been held liable for a manufacturer's defective product (*Hughes Provision Co.* v. *La Mear Poultry & Egg Co.* (Mo.) 242 S. W. 2d 285); and where a prime contractor has been held liable for the fault of an independent subcontractor (*George A. Fuller* v. *Otis Elevator Co.,* 245 U. S. 489).

The practical effect of the application of this principle is to visit the financial responsibility for an injury upon the person who, as between those legally liable to the injured person, is the actual wrongdoer. In such cases the law implies an obligation on the part of the delinquent party to reimburse the one who, by discharging the liability, has thereby conferred a benefit upon the actual wrongdoer, for which, in equity and good conscience, he must make recompense. *Terminal R. R. Assn.* v. *United States,* 182 F. 2d 149, 151 (C. A. 8), certiorari denied, 340 U. S. 825; *George's Radio* v. *Capital Transit Co.,* 126 F. 2d 219, 222 (C. A. D. C.); *Crab Orchard Imp. Co.* v. *Chesapeake & O. Ry. Co.,* 115 F. 2d 277, 282 (C. A. 4); Restatement, *Restitution,* § 76; Woodward, *Quasi Contracts,* § 259; Leflar, *Contribution and Indemnity Between Tortfeasors,* 81 U. of Pa.

L. Rev. 130; *Port Jervis* v. *Port Jervis First Nat. Bank,* 96 N. Y. 550; *Churchill* v. *Holt,* 127 Mass. 165.

2. (a) *The United States, as employer, may maintain a conventional action for indemnity without specific statutory authorization.*—By the Federal Tort Claims Act Congress has placed the United States, in general, on a legal parity with a private employer with respect to liability for the "negligent or wrongful act or omission" of its employees "while acting within the scope" of employment (28 U. S. C. 1346 (b)). The obligation of the United States to persons injured through the tortious acts of its agents, like the liability of a private employer, has its roots in the common law doctrine of *respondeat superior.* The obligation, prior to the Tort Claims Act, was recognized as a matter of legislative grace through the practice of affording limited relief through private bills in Congress.[9] The

[9] Cf. Small Tort Claims Act of December 28, 1922, 42 Stat. 1066. In 40 Op. A. G. 38, it was ruled that the Secretary of Agriculture was without express or implied authority *administratively* to deprive an employee of compensation in satisfaction of a damage claim adjusted under the 1922 Act and occasioned by the employee's negligence. It was intimated in the opinion that if reimbursement were to be attempted the employee would be entitled to his day in court (*Id.*, pp. 39–40), a condition wholly satisfied in the instant case since respondent, under Rule 14 (a) (*supra*, p. 4), was at liberty to assert against the original plaintiff as well as the United States "any defenses which the third-party plaintiff has to the plaintiff's claim."

Tort Claims Act "merely substitutes the District Courts for Congress as the agency to determine the validity and amount of the claims" (*United States* v. *Yellow Cab Co.*, 340 U. S. 543, 549) and thereby converts what was theretofore a moral obligation,[10] by reason of the sovereign's immunity, into a legal obligation enforceable through the courts. The derivative character of the obligation remains the same, but, by virtue of the Act, recovery on a tort claim is no longer a matter of legislative grace. Instead, the Government now stands on a plane with a private employer and may be *compelled* to respond to an injured person for the negligent acts of an agent.

In assuming the burden of liability common to a private employer, it would seem that the United States should be entitled to the corresponding rights resulting therefrom, such as the right to contribution and indemnity. In accordance with this view and without specific statutory authorization, it has been held that the United States is entitled to contribution from a joint tortfeasor (*United States* v. *Yellow Cab Co.*, 340 U. S. 543),[11] and that it is entitled to indemnity from a third-party tortfeasor (not

[10] The relief afforded claimants through private bills partakes of a legislative gratuity founded only on a moral obligation and does not create a right of restitution. Cf. *Restatement, Restitution*, § 112.

[11] "Of course there is no immunity from suit *by* the Government to collect claims for contribution due it from its joint tort-feasors. The Government should be able to enforce

a Government employee) who is primarily liable (*United States* v. *Savage Truck Lines,* Nos. 6648–6651, decided December 21, 1953, 2d C. A. 4). See also *infra,* pp. 27 *ff.* The nature of the liability of the United States and its right to indemnity in this case is the same as that which gave rise to the right of contribution and the right of indemnity in those cases and, we submit, logically compels a like result.

Thus, by the judgment against it in the original action, the United States is compelled to discharge a liability which, as between it and its employee, is primarily that of the latter. It is the employee's wrongful conduct which forms the gravamen of the claim against the United States and for which the employee is personally and primarily responsible. The liability of the United States, on the other hand, stems solely from the employer-employee relationship. Under established principles of law, any private employer in these circumstances may maintain an action against the negligent employee for indemnification. See *supra,* pp. 14–17. As an employer, the United States is in the same position.

For the United States to maintain such a suit, predicated on quasi-contractual principles, no special statutory authorization is necessary (cf. *Clearfield Trust Co.* v. *United States,* 318 U. S.

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this right in a federal court not only in a separate action but by impleading the joint tort-feasor as a third-party defendant." (340 U. S. at 551–552.)

363, 368; *United States* v. *Carter,* 217 U. S. 286; *Wisconsin Central R. R. Co.* v. *United States,* 164 U. S. 190), but the claim may be asserted as an exercise of the inherent powers of the United States, in its dual role as a political entity and employer, to safeguard its rights and assets. Cf. *Dugan* v. *United States,* 3 Wheat. 172, 179–180; *United States* v. *Buford,* 3 Pet. 12; *United States* v. *Bank of the Metropolis,* 15 Pet. 377; *Cotten* v. *United States,* 11 How. 229; *McElrath* v. *United States,* 102 U. S. 426, 440–441; *United States* v. *San Jacinto Tin Co.,* 125 U. S. 273, 279, 284; *Clearfield Trust Co.* v. *United States,* 318 U. S. 363; *United States* v. *California,* 332 U. S. 19, 27; *United States* v. *Silliman,* 167 F. 2d 607 (C. A. 3), certiorari denied, 335 U. S. 825.[12] Accordingly, the United States may normally recover on quasi-contracts, including the quasi-contractual right of indemnity, without specific statutory authorization.

(b) *United States* v. *Standard Oil Company, 332 U. S. 301, is not to the contrary.*—Respondent has urged below that, despite these established rules, *United States* v. *Standard Oil Company,* 332 U. S. 301, bars this indemnity action against the negligent employee. There, the Government

[12] "It is not denied that Congress has given a very broad authority to the Attorney General to institute and conduct litigation in order to establish and safeguard government rights and properties." *United States* v. *California,* 332 U. S. 19, 26–27. See 5 U. S. C. 291, 309 and 28 U. S. C. 1345.

brought suit in tort against the party who had injured a soldier for the loss of the soldier's services, invoking by analogy the principles of the ancient action *per quod servitium amisit.* The Court held that that type of action had never been applied to the loss of the services of a soldier and, in the absence of specific legislative direction, declined to extend that doctrine into what it conceived to be a novel field. It reasoned that losses of the type for which the Government there claimed compensation were matters concerning which Congress was fully advised and that, as a fiscal matter, Congress would have provided for correcting the situation had it deemed it desirable so to do.

Besides being strongly urged in the court below by respondent, the *Standard Oil* case has been invoked in a number of instances for the purpose of precluding any action by the United States for the recovery of monies on the ground that, where fiscal affairs are involved concerning which a congressional awareness exists, no action may be maintained in the absence of explicit statutory authorization. Cf. *United States* v. *Guy W. Capps, Inc.,* 204 F. 2d 655, petition for writ of certiorari granted November 16, 1953, No. 331, this Term. We submit that the *Standard Oil* case has no such broad implications and is inapplicable to the type of action here brought.

(i) The employer-employee relationship between the Government and its employees involves

none of the unique characteristics present in the *sovereign-soldier* relationship with which this Court was concerned in *United States* v. *Standard Oil Co.*, 332 U. S. 301. While the latter relationship is without private parallel and an action based upon the tortious interference with that relationship was without common law precedent,[13] the right of an *employer* to recover from his *employee* for damages which he has been compelled to pay as a result of the employee's negligence has always been recognized as maintainable by way of suit based on quasi-contract or unjust enrichment. It is only necessary to provide this protection for another employer, which happens in this case to be the United States. No creation of a new cause of action, a new right, is sought—only the nondiscriminatory application of an existing one. *Standard Oil* itself points out expressly (332 U. S. at 315, fn. 22) that no special statutory authorization is required where the United States merely seeks to enforce a traditional remedy.[14]

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[13] In *Standard Oil*, the Court repeatedly noted that the Government urged the creation of a *new* right. "The Government does not contend that the liability sought has existed heretofore. It frankly urges the creation of a new one." 332 U. S. at 314, fn. 21; see also 332 U. S. at 311–316.

[14] The right of the United States to maintain an indemnity action against its employee is supported by *Burks* v. *United States*, 116 F. Supp. 337, 340 (S. D. Tex.); 3 Moore's *Federal Practice* (2d ed.), pp. 507–514; Prosser, *Torts*, p. 1114; Comment, 56 Yale Law Jour. 534, 560 n. 117; 33 A. B. A. J. 857, 859.

(ii) There is nothing in the relationship of the Government and its employees warranting a discriminatory treatment of the United States with respect to its rights as an employer, or a more preferential treatment of a Government employee with respect to common law liabilities. In this respect, the Government employee has always been on a par with the private employee. The employee's liability for tortious conduct is not new and the only novelty of the case is that the liability now runs to the United States instead of the injured claimant. Significantly, Congress never saw fit to extend the sovereign immunity of the United States to its agents but was content, in most cases, to let responsibility fall where the law placed it. In light of the historic inaction of Congress in this field, it would require, we believe, explicit affirmative language to conclude that Congress has placed a premium upon negligent conduct by absolving, in all cases, the actual wrongdoer from responsibility.[15]

The conclusion that a delinquent Government employee is recognized to have normal liability to his employer also derives support from the fact that, as recently as the first session of the 83d Congress, four public bills were introduced [16]

[15] For the view of the Senate Committee on the Judiciary with respect to indemnifying a government employee held liable in a private action, see S. Rep. No. 2025, 82d Cong., 2d Sess., p. 2, *infra*, p. 24, fn. 18.

[16] H. R. 3063 (99 Cong. Rec. 1128); H. R. 3320 (99 Cong. Rec. 1288); H. R. 3698 (99 Cong. Rec. 1663); H. R. 4261 (99

providing that no post office vehicle operator *shall be responsible or liable to the United States* (1) for damage to a motor vehicle in the performance of official duties,[17] or (2) for personal injury or property damage to any person, resulting from the operation of a post office vehicle.[18] Such bills,

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Cong. Rec. 2361). Each bill was referred to the Committee on the Judiciary, without further action to date. Three bills of like import were introduced in the 82d Cong., 2d Session. They were referred to either the Senate Committee on the Judiciary or House Post Office and Civil Service Committee without further action. S. 2929 (98 Cong. Rec. 2989); H. R. 6669 (98 Cong. Rec. 1105); H. R. 6886 (98 Cong. Rec. 1870).

[17] Cf. 39 C. F. R. § 3.4 (15 F. R. 5692):

"(a) *Determination of responsibility.*—Whenever Government property of any kind is lost or damaged through the carelessness, negligence, willfulness, or malice of a postal employee, the facts shall be reported by the postmaster or district superintendent, Postal Transportation Service, to the proper bureau of the Post Office Department for determination as to whether such postal employee shall be held personally responsible for the value of the property so lost, damaged, or destroyed."

[18] Cf. Pvt. L. 809, 810, 811, 82d Cong., 2d Sess. (66 Stat. A. 138–139). And see Pvt. L. 820, 82d Cong., 2d Sess. (66 Stat. A. 143) which provided for the payment of a sum sufficient to satisfy a judgment in a state court against a postal employee. However, see S. Rep. No. 2025, 82d Cong., 2d Sess., p. 2, anent H. R. 5911 [Pvt. L. 820], which states:

"With respect to the Government employee, in this case a postal carrier, it must be borne in mind that as between the United States and one of its employees the ultimate responsibility for the negligence of the employee rests on the employee's shoulders. *Even when a judgment has been obtained under the Federal Tort Claims Act the United States has a right of action over against the employee.* [Emphasis added.]

"The Federal Government has not, however, followed such

in so far as they seek to eliminate the Government's right of indemnity, are footless if that right is non-existent in the first place.

(iii) *Standard Oil* stressed the connection between the claim there asserted and federal fiscal policy (332 U. S. 301, 314–315), and recognition of the Government's right to contribution and indemnity from persons jointly or primarily liable for the injuries of a third person undoubtedly also bears a relationship to the fiscal affairs of the United States. But the same is true whenever the Government asserts a common law cause of action. Yet, the fiscal aspects of a case have never been held, without more, to be a sufficient basis for denying to the United States the common law rights

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an extreme policy. Especially in these private claims this committee has recognized that the drivers of Government vehicles are not covered by insurance and do not have an opportunity to obtain such insurance. Consequently each claim is scrutinized on its merits. If in the opinion of the committee there was no negligence on the part of the postal carrier or his negligence was only slight the committee would undertake to relieve him. If on the other hand the postal carrier has exceeded the scope of his employment or has been substantially negligent the committee will not undertake to relieve the postal carrier.

"In this particular instance the committee is of the opinion that the negligence of the postal carrier was only slight and consequently recommends that he be relieved as provided in this bill, H. R. 5911. There is ample precedent for such action in S. 2147, S. 1988, S. 1741, and more recently in S. 1690, all in the Eighty-second Congress."

of a private individual.[19] The emphasis, in the *Standard Oil* opinion, on congressional control over fiscal matters must plainly be taken in its special context of a claim for the creation of a *new* right, unknown to the common law, a right which would be an incident of a uniquely governmental relationship, that of sovereign and soldier. Such is not the case here, and the Court need not defer to Congress.

Even if Congress is held to be the necessary arbiter where fiscal matters are concerned, we submit that the present action for indemnity, as in the case of contribution (*United States* v. *Yellow Cab*, 340 U. S. 543, 551–552) (see *supra*, pp. 18–19; *infra*, pp. 29–30), has been implicitly sanctioned by Congress, in the Tort Claims Act, by waiving the immunity of the United States from suit for tort wrongs, by equating the Government's liability for tortious acts of its agents with that of a private individual, and by remitting particular rights and liabilities to the general law rather than depending upon legislative definition and circumscription (28 U. S. C. 1346 (b), 2674). See *infra*, pp. 27 *ff*.

[19] Cf. *Dugan* v. *United States*, 3 Wheat. 172, 179–180; *United States* v. *Buford*, 3 Pet. 12; *United States* v. *Bank of the Metropolis*, 15 Pet. 377; *Cotton* v. *United States*, 11 How. 229; *McElrath* v. *United States*, 102 U. S. 426, 440–441; *Wisconsin C. R. R. Co.* v. *United States*, 164 U. S. 190; *Clearfield Trust Co.* v. *United States*, 318 U. S. 363; *United States* v. *Silliman*, 167 F. 2d 607 (C. A. 3), certiorari denied, 335 U. S. 825. See *supra*, pp. 18–20.

B. THE FEDERAL TORT CLAIMS ACT, NEITHER EXPRESSLY NOR BY IMPLICATION, DEPRIVES THE UNITED STATES OF THE RIGHT TO ENFORCE AN EMPLOYER'S COMMON LAW RIGHT OF INDEMNITY

As we have shown above at pp. 11–20, the right of indemnity is a quasi-contractual right which the United States could enforce without any express grant from Congress. Accordingly, had Congress intended to preclude the assertion of such a right, it would have been necessary for it so to have provided in specific terms in the Tort Claims Act. Instead, Congress, although aware that the Act contained no specific provision one way or another concerning the Government's right of indemnity, chose to leave the question for solution in accordance with the rights existing between private parties.

1. *The developing legislative history of the Tort Claims Act discloses a congressional purpose to follow conventional law.*—Tort claims bills introduced in the 76th Congress and continuing through the 79th Congress [20] reveal a continual

[20] H. R. 7236, 76th Cong., 1st Sess. (86 Cong. Rec. 12032); S. 2690, 76th Cong., 1st Sess. (84 Cong. Rec. 7834); H. R. 5299, 77th Cong., 1st Sess. (87 Cong. Rec. 6024); H. R. 5373, 77th Cong., 1st Sess. (87 Cong. Rec. 6234); H. R. 6463, 77th Cong., 2d Sess. (88 Cong. Rec. 691); S. 2207, 77th Cong., 2d Sess. (88 Cong. Rec. 417); S. 2221, 77th Cong., 2d Sess. (88 Cong. Rec. 586), passed Senate, March 30, 1942 (88 Cong. Rec. 3175), reported by House Committee with amendment, H. Rep. No. 2245, 77th Cong., 2d Sess. (88 Cong. Rec. 5274); H. R. 817, 78th Cong., 1st Sess. (89 Cong. Rec. 50); H. R. 1356, 78th Cong., 1st Sess. (98 Cong. Rec. 250);

modification in a direction away from statutory enunciation of particular rights and liabilities, characteristic of earlier proposed enactments (see *Feres* v. *United States,* 340 U. S. 135, 138–139), and toward reliance upon accepted principles of general law to be applied by the courts—once jurisdiction over the particular type of suit has been acquired. See *United States* v. *Yellow Cab Co.,* 340 U. S. 543, 549. The evolution of this legislative purpose, culminating in Title IV of the Legislative Reorganization Act, 60 Stat. 842, resulted in the ultimate excision of specific provisions relating to such matters as the distribution of proceeds in wrongful death actions, contributory negligence, aggravation of damages, and the distribution of benefits where the claimant died pending disposition of his claim. See Hearing Before House Committee on the Judiciary on H. R. 5373 and H. R. 6463, 77th Cong., 2d Sess. p. 27.[21] The assimilation of the United States to

S. 1114, 78th Cong., 1st Sess. (89 Cong. Rec. 4500); H. R. 181, 79th Cong., 1st Sess. (91 Cong. Rec. 21); S. 2177, 79th Cong., 2d Sess. (92 Cong. Rec. 4981).

[21] See H. Rep. No. 2245, 77th Cong., 2d Sess., p. 12: "Section 403 of the Senate Bill [S. 2221, 77th Cong., 2d Sess.] provided for proportionate liability of the United States where a Government employee was a joint tort-feasor with someone else. This provision is not contained in the recommended bill and in cases involving joint tort-feasors the rights and liabilities of the United States will be determined by the local law." Compare H. R. 6463, 77th Cong., 2d Sess., Sec. 403, and S. 2221, 77th Cong., 2d Sess., Sec. 403, with H. R. 181, 79th Cong., 1st Sess.

a private individual with respect to the tortious acts of its agents similarly resulted in the ultimate omission from the final Act of a provision pertaining to the contribution rights of the United States where persons were involved, other than government employees, who were jointly responsible for the injury or damages.[22] As the *Yellow Cab* case held (*supra,* pp. 18–19), contribution is nevertheless available to the Government; so is the right of indemnity against others than federal employees (*supra,* pp. 18–19).

By placing the United States in the position of a private employer the necessity for express reservations of the right of indemnity never arises, since such a right implicitly follows from the treatment of the United States as a private employer (cf. *United States* v. *Yellow Cab Co.,* 340 U. S. 543, 550–551, n. 8). The failure of

[22] This particularization of rights and liabilities explains the inclusion, in some earlier bills, of a provision specifically permitting the Government to sue the negligent employee for indemnity. These provisions were included with an express recognition that they merely spelled out the principal's common-law right against his agent.

See e. g., Assistant Attorney Gen. Rugg, appearing at a Hearing Before a Subcommittee of the Committee on Claims, House of Representatives, 72d Cong., 1st Sess., on a General Tort Bill (H. R. 5065), p. 14:

"I think that under the common law the principal has the right of action against the agent for any damages that the agent causes and for which the principal is ultimately responsible. This is not a very important section because, generally speaking, the agents are not financially responsible, so that the right of action is of no genuine value."

Congress, in the present Act, expressly to provide for reimbursement from government employees is in keeping with its reliance upon principles of general law. Until there is an express negation of the right of indemnity, the general law prevails and the present type of action may be maintained.[23]

[23] See *supra*, pp. 23–25, regarding the pendency of legislation limiting the indemnity rights of the United States as to postal vehicle operators.

There is legislative material in the 77th Cong., 2d Sess., which discloses that there was no intention to provide for recourse against the employee where there was involved an *administrative* settlement up to $1,000. See S. Rept. 1196, 77th Cong., 2d Sess., p. 5. And see R. 55, n. 3. In the 77th Cong., 2d Sess., hearings were held on H. R. 5373 and H. R. 6463. In discussing the provisions of the bills which made acceptance of an *administrative* award by a claimant effective as a complete release as to any claim against either the employee or the United States (Sec. 201), Asst. Atty. Gen. Shea testified:

"The CHAIRMAN. Mr. Shea, you are discussing and directing your remarks to the matter where, if a person is injured and files a claim against the Government and the Government satisfied that claim, that is the end of the claim against anybody?

"Mr. SHEA. That is right.

"The CHAIRMAN. What is the arrangement when the Government has an employee who is guilty of gross negligence and injury results? Is there any requirement that that employee should in any way respond to the Government if it has to pay for the injury, in the event of gross negligence?

"Mr. SHEA. Not if he is a Government employee. Under those circumstances, the remedy is to fire the employee.

"Mr. MCLAUGHLIN. No right of *subrogation* is set up?

"Mr. SHEA. Not against the employee." [Emphasis added.] [Hearings on H. R. 5373 and H. R. 6463 Before the Committee on the Judiciary, House of Representatives,

2. *28 U. S. C. 2676 does not destroy the right of the United States to maintain a common law action of indemnity against its negligent employee.*—Section 2676 of the Act, upon which the decision below rests, provides that a judgment in a Tort Claims action "shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." This, of course, applies whether the judgment is one dismissing the action or is one entering judgment against the United States. On its face, the Section applies only to actions *by the claimant* and does not prejudice rights of

77th Cong., 2d Sess., pp. 9–10; see also, S. Rep. No. 1196, 77th Cong., 2d Sess., p. 5.]

While this Court has recognized that the shape of the Tort Claims Act was largely determined during its consideration by the 77th Congress, 2d Sess. (*United States* v. *Spelar*, 338 U. S. 217, 219–220; and see *Dalehite* v. *United States*, 346 U. S. 15, 24–30), it has also held that the "views expressed in the earlier legislative history of this particular bill lose force by their omission from the 1946 report and discussion." *United States* v. *Yellow Cab Co.*, 340 U. S. 543, 551. Moreover, it is to be observed (a) that Mr. Shea was discussing an *administrative* settlement where it could well be asserted that the payment was voluntary and hence gave rise to no right of indemnity (see fn. 10, *supra*, p. 18), and (b) that he was answering a specific question concerning *subrogation* for which, unlike indemnity, it would be necessary to make specific statutory provision. Also, consideration was not directed to the situation of insured employees. See fns. 2, 6, and 18, *supra*, pp. 3–4, 11–12, 24.

the United States.[24] The effect of the Section, for the claimant, is to make the judgment, rather than its satisfaction (as in the case of a private employer[25]), a conclusive bar to the claimant's right against the employee.[26]

[24] What is now Section 2676 of 28 U. S. C. appeared in Section 410 (b) of S. 2177, 79th Congress, 2d Session, and ultimately in Section 410 (b) of the Legislative Reorganization Act of 1946. Its purpose was not the subject of explanation in the Committee Report of the Joint Committee on the Reorganization of Congress, 79th Congress, 2d Session, or in S. Rep. No. 1400, 79th Congress, 2d Session, submitted by the Special Committee on the Organization of Congress. Its genesis, however, may be traced to H. R. 5373, introduced in the 77th Congress, 1st Session (87 Cong. Rec. 6234) where it was added by the committee on the Judiciary (Section 301). The Committee comment on the provision was as follows: "Under the present bill, the judgment rendered will constitute a bar to further action upon the same claim not only against the Government but also against the employee whose wrongful conduct gave rise to the claim." See Memorandum for the Use of the Committee on the Judiciary Explanatory of Committee Print of H. R. 5373, 77th Cong., 2d Sess., p. 25.

The provision likewise appeared in H. R. 6463 (88 Cong. Rec. 691) and in the companion bill, S. 2207 (88 Cong. Rec. 417), introduced in the Second Session of the 77th Congress. The implication that Section 2676 was intended to deprive the Government of its right to indemnity (R. 55–56) emanates, not from the language itself, but from the legislative history of the administrative settlement provisions of the tort claims bills considered by the 77th Congress (R. 55, n. 3). See *supra*, p. 30, fn. 23.

[25] *Eberle* v. *Sinclair Prairie Oil Co.*, 120 F. 2d 746 (C. A. 10); *Royal Indemnity Co.* v. *Olmstead*, 193 F. 2d 451 (C. A. 9); Restatement, *Judgments*, § 95; *Lovejoy* v. *Murray*, 3 Wall. 1, 17; cf. *Anderson* v. *Abbott*, 321 U. S. 349, 355; *Sessions* v. *Johnson*, 95 U. S. 347, 349.

[26] Thus, for purposes of an action brought under the Tort Claims Act Congress has adopted the rule that the cause of

The apparent explanation for making the judgment, rather than the satisfaction, conclusive of the claimant's rights lies in the assured solvency of the United States;[27] at the same time, the provision precludes a claimant, perhaps dissatisfied with a court's award, from submitting the same cause of action to a jury in a subsequent proceeding brought against the employee. Cf. Restatement, *Judgments,* § 96 (1) (b).

a. There is no reason to extend Section 2676 beyond its terms to grant a special benefit to the federal employee, a benefit unavailable to a private employee. Whether the judgment itself (under Section 2676) or the satisfaction of the judgment (in the ordinary tort case) be conclusive, in either event the right of action by the injured person against the negligent employee is barred.[28] The benefit to the employee is the same. In the case of the private employee, the fact that the injured party is precluded from proceeding against him does not militate against his private employer's right of indemnity, and the same result should follow where the United States is the employer—unless, perhaps, there be

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action merges in the judgment. This rule, though never generally accepted in the United States, prevailed in England until 1935 when modified by Section 6 (a) (b) of the Law Reform (Married Women and Tortfeasors) Act, 1935, 25–26 Geo. 5, c. 30. See 13 Halsbury's Laws of England [1934] (2d Ed.), pp. 416–418.

[27] Cf. *United States* v. *Shaw*, 309 U. S. 495; *Federal Housing Administrator* v. *Burr*, 309 U. S. 242.

[28] See footnote 25, *supra*, p. 32.

proof that Congress desired to put the federal employee on a special plane.

Nothing in the terms of the Tort Claims Act nor in the history of tort claims legislation reveals any such purpose. The objectives of the Tort Claims Act were twofold: To extend a judicial remedy against the United States to persons injured or damaged by the tortious conduct of government agents (*Feres* v. *United States,* 340 U. S. 135) and, at the same time, to relieve Congress of the burden of the private bill procedure through which a limited form of relief had theretofore been available (*United States* v. *Yellow Cab Co.,* 340 U. S. 543, 549–550). Nothing discloses that, in providing tort relief, Congress was in any way motivated by an avuncular solicitude towards its employees and intended thereby to confer, directly or indirectly, an immunity from tort liability upon its servants which no employee of a private employer enjoys. The negligent government agent was personally liable for his tortious conduct prior to the Act and remains so today. That a remedy is available against the United States, where the employee was acting within the scope of employment, does not absolve the employee from liability any more than a private employer's liability, under the doctrine of *respondeat superior,* absolves the private employee from tort responsibility.

The specific purpose of Section 2676 — aside from the adoption of the principle of merger of

the cause of action in the judgment (*supra*, fn. 26, p. 32) was to benefit the Government. As explained by Assistant Attorney General Shea when discussing a like provision in the case of an administrative settlement (Hearings on H. R. 5373 and H. R. 6463 before the Committee on the Judiciary, House of Representatives, 77th Cong., 2d Sess., p. 9):

> Mr. SPRINGER. I would like to direct your attention, Mr. Shea, to line 19. Why do you provide this acceptance of the award as constituting a bar to the claim against the employee? Is that the intention of the provision, and what is the ultimate purpose of it?
>
> Mr. SHEA. I gather that that was the question to which the chairman was also directing his attention, and the answer is this: It has been found that the Government, through the Department of Justice, is constantly being called on by the heads of the various agencies to go in and defend, we will say, a person who is driving a mail truck when suit is brought against him for damages or injuries caused while he was operating the truck within the scope of his duties. Allegations of negligence are usually made. It has been found, over long years of experience, that unless the Government is willing to go in and defend such persons the consequence is a very real attack upon the morale of the services. Most of these persons are not in a position to stand or defend large damage suits, and

they are of course not generally in a position to secure the kind of insurance which one would if one were driving for himself.

If the Government has satisfied a claim which is made on account of a collision between a truck carrying mail and a private car, that should, in our judgment, be the end of it. After the claimant has obtained satisfaction of his claim from the Government, either by a judgment or by an administrative award, he should not be able to turn around and sue the driver of the truck. If he could sue the driver of the truck, we would have to go in and defend the driver in the suit brought against him, and there will thus be continued a very substantial burden which the Government has had to bear in conducting the defense of post-office drivers and other Government employees.

b. Insofar as the conclusiveness of the *judgment* in an action under the Tort Act (as distinguished from the *satisfaction*) may be considered an indirect special benefit to the Federal employee, Section 2676 is merely an application of the generally accepted common law principle of *res judicata* or estoppel by judgment which, in the case of a private employer and employee, could result in a comparable benefit to a private employee.[29]

[29] Some confusion seems to exist in this field (cf. *Bigelow* v. *Old Dominion Copper Co.*, 225 U. S. 111, 129; *McAlevey* v. *Litch*, 234 Mass. 440, 125 N. E. 606; *Myers' Adm'x* v. *Brown*, 250 Ky. 64, 61 S. W. 2d 1052), and Congress may have desired to remove all uncertainty.

Thus, courts exercising common law jurisdiction generally follow the rule that, where liability in an action growing out of an accident is claimed because of the alleged negligence of an agent, a judgment in favor of the principal, upon a ground equally applicable to the agent, is *res judicata* or conclusive as against the injured person's independent right against the agent.[30] In *Giedrewicz* v. *Donovan,* 277 Mass. 563, 179 N. E. 246, a judgment in favor of an employer in an action against him to recover for personal injuries to a pedestrian allegedly caused by the negligent operation of the employer's automobile was held to be a bar to a subsequent action by the injured person against the employee for the same injury. The court said (277 Mass. at 569):

> As a matter of public policy and in the interest of accomplishing justice, the better rule would seem to be that, if it is clearly established, in the trial of an action either against the employee or against the principal for damages caused by the employee's negligent conduct, that the employee is not negligent, the judgment in the case first tried is a bar to a subsequent action by the same plaintiff for the same negligent act

[30] The same result follows where the injured person proceeds solely against the agent. A judgment in favor of the agent is a bar to a subsequent action against the principal who would be liable only under the doctrine of *respondeat superior. King* v. *Stuart Motor Co.*, 52 F. Supp. 727 (N. D. Ga.); *Overstreet* v. *Thomas*, 239 S. W. 2d 939 (Ky.); Restatement, *Judgments*, § 99.

> of the same employee. In principle it would seem to be immaterial whether the first judgment was obtained in an action against the employer provided the only ground for holding the employer is the negligence of the employee and it clearly appears that in the first trial the employee was found to be free from culpability.

And in *Jones* v. *Young,* 257 App. Div. 563, 14 N. Y. S. 2d 84, where the plaintiff, who had sustained injuries as a result of the alleged negligence of a state employee, had had his day in the Court of Claims in an action against the State under the New York Court of Claims Act, on the issue of his contributory negligence and of the negligence of the state's employee, it was held that he was not entitled to an opportunity to try the same question in a subsequent action against the employee. See also *Emery* v. *Fowler,* 39 Me. 326; *Barrabee* v. *Crescenta Mut. Water Co.,* 88 C. A. 2d 192, 198 P. 2d 558 (Cal.); *Spitz* v. *BeMac Transport Co.,* 334 Ill. App. 508, 79 N. E. 2d 859; *Silva* v. *Brown,* 319 Mass. 466, 66 N. E. 2d 349; *Jones* v. *Valisi,* 111 Vt. 481, 18 A. 2d 179. Cf. *Bigelow* v. *Old Dominion Copper Co.,* 225 U. S. 111, 127–128. 1 Freeman, *Judgments,* 5th Ed., § 469; Restatement, *Judgments,* §§ 96, 99.[31]

[31] The rule exemplified by these cases, generally considered as an exception to the principle of *res judicata* by reason of diverse parties in the subsequent action and a lack of mutuality, is not confined to the master-servant relationship but finds further application wherever, without fault, one person

c. Accepting the view that the action for indemnity was based on the quasi-contractual theory that the employers' satisfaction of a judgment based on the tortious conduct of its employee confers a benefit on the employee for which the employer should receive restitution, the court below held that 28 U. S. C. 2676 had the effect of extinguishing the benefit and thereby precluding the right of restitution. It argued that since, under the statutory provision, the entry of judgment against the Government terminated the responsibility of the employee for his own negligence, payment of the judgment no longer conferred a benefit on the employee, the employee was not unjustly enriched, and the Government was accordingly not entitled to restitution.

This argument is fallacious. The employee is subject to suit by the injured person at any time up to the entry of judgment against the Government, and therefore the very fact that the judgment extinguishes this liability confers a decided benefit upon the employee, amounting to unjust enrichment for which he can be held accountable. The initial source of this benefit was the assumption of liability by the United States under the

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is made responsible for the tort of another. See e. g. *Washington Gas Co.* v. *District of Columbia*, 161 U. S. 316, and cases cited, *supra*, p. 15; *Bigelow* v. *Old Dominion Copper Co.*, 225 U. S. 111, 128; *Adriaanse* v. *United States*, 184 F. 2d 968 (C. A. 2), certiorari denied, 340 U. S. 932; *Bruszewski* v. *United States*, 181 F. 2d 419 (C. A. 3). See also, Restatement, *Judgments*, § 96, comment b.

Tort Claims Act, and it is therefore attributable to the United States. Cf. *Terminal R. Assn.* v. *United States,* 182 F. 2d 149 (C. A. 8).

The court below disclaimed any suggestion that its decision was based on the theory that liability for indemnity does not arise until *payment* of the judgment against the Government (cf. Restatement, *Restitution,* §§ 77 (1), 86 comment b; *Dunn* v. *Uvalde Asphalt Paving Co.,* 175 N. Y. 214, 67 N. E. 439) and that at the time of payment the employee is not enriched because his liability has been previously extinguished by the entry of judgment (see R. 55, n. 2). Moreover, such a theory is contrary to generally accepted principles of the law of restitution. Restatement, *Restitution* § 78, comment c, states the law as follows:

> A person who has become secondarily liable upon a transaction * * * because of the fault of another is entitled to restitution from the other if he performs a duty owed by him to the creditor [i. e., the injured person], even though before such performance the duty of the other has terminated. * * *

This principle is illustrated by the rule that the employer may recover indemnity from the employee even though at the time of the employer's payment an action by the injured claimant against the employee was barred by limitations. Cf. *Reed* v. *Humphrey,* 69 Kan. 155, 76 Pac. 390;

Godfrey v. *Rice,* 59 Me. 308, 310; *Sibley* v. *McAllaster,* 8 N. H. 389. Likewise, the employer is entitled to indemnity even though the injured claimant's action against the employee is barred because the employee and the injured claimant are husband and wife. See e. g., *Schubert* v. *Schubert Wagon Co.,* 249 N. Y. 253, 257, 164 N. E. 42, 43; *Hudson* v. *Gas Consumers' Assn.,* 123 N. J. L. 252, 254, 8 A. 2d 337, 339. So here, the United States is not precluded from seeking indemnity, after payment of the judgment, merely because the prior entry of the judgment has absolved the employee from liability to the claimant.

We submit that Section 2676 effects no material change in the substantive rights of a claimant or of the liabilities of an employee which justifies an inference that Congress intended, by the Tort Claims Act, to deny to the United States the employer's traditional right of indemnity.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment should be reversed.

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